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No. 84-10

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITIES OF BETHANY, BUSHNELL, ILLINOIS, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted the terms of a contract, entered into by a wholesale electric utility with some of its customers, to permit the utility to increase its rates by filing new rates with the Federal Energy Regulatory Commission under Section 205 of the Federal Power Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43a-70a) is reported at 727 F.2d 1131. The orders of the Federal Energy Regulatory Commission (Pet. App. 3a-30a, 33a-39a) are reported at 20 F.E.R.C. para. 61,043 (Opinion No. 142) and 20 F.E.R.C. para. 61,435 (Opinion No. 142-A).

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1984. A petition for rehearing was denied on April 6, 1984 (Pet. App. 73a-74a). The petition for a writ of certiorari was filed on July 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 205(a)-(e) and 206(a) of the Federal Power Act, 16 U.S.C. 824d(a)-(e) and 824e(a), are set forth at App., *infra,* 1a-4a.

STATEMENT

1. Under the Federal Power Act (Power Act), Subch. II, 16 U.S.C. 824 *et seq.,* the Federal Energy Regulatory Commission has jurisdiction over wholesale sales of electricity in interstate commerce. Section 205(a) of the Power Act, 16 U.S.C. 824d(a), declares that all rates and charges for such sales "shall be just and reasonable."

Before a utility may increase its rates, it must file with the Commission a new schedule setting forth the changes to be made in its existing rates. Section 205(e) of the Power Act, 16 U.S.C. 824d(e), provides that, upon such a filing, the Commission may order a hearing on the lawfulness of the new rates and may suspend them for up to five months, after which they may be collected, subject to refund (with interest) of any portion of the increased rates that the Commission finds is not justified.

Section 206(a) of the Power Act, 16 U.S.C. 824e(a), empowers the Commission to examine existing rates and to establish new ones where it finds, after a hearing, that any rate is "unjust [or] unreasonable." Rate adjustments under Section 206(a) are prospective only, with no power in the Commission to order refunds.

In the "*Mobile-Sierra*" cases, this Court held that the relations between a utility and its customers are established initially by contract, subject to the overriding authority of the Commission to require alteration of the contractual arrangements when the public interest requires. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956). In addition, under Section 205 of the Power Act, 16

U.S.C. 824d, a utility may act unilaterally to establish and change its rates, just like a seller of an unregulated commodity, unless it has entered into a contract with its customers providing otherwise. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103 (1958).

2. The question in this case is whether contracts entered into in 1965 between the Central Illinois Public Service Company (CIPS) and four of its wholesale customers, the Illinois cities of Flora, Greenup, Casey and Newton, permit CIPS to change its rates unilaterally under the procedures of Section 205.

The contractual provision at issue provides (Pet. App. 20a, 61a):

> The term of this agreement shall be for a period of 20 years from and after the effective date hereunder; provided, however, that the rates and charges for service hereinbefore set forth shall apply only during the first ten years of the period, and the rates and charges for the second ten years of the period shall be mutually agreed to by both parties subject to the approval of the regulatory body or bodies as may have jurisdiction thereof.

The dispute over the meaning of this provision arose during the course of an investigation by the Commission into the justness and reasonableness of a rate increase filed by CIPS in 1979 under Section 205. Petitioners objected to the rate increase, claiming that their particular contracts with CIPS, containing the provision set forth above, did not permit the utility to increase its rates unilaterally as to them.

The Commission upheld the new rates filed by CIPS as just and reasonable, but ruled that under the contracts the new rates would take effect prospectively as of the date of the Commission's order (Pet. App. 3a-29a, 33a-39a). The

Commission concluded that the contracts contemplated rate changes after the first ten years, but that CIPS could not make such rate changes unilaterally pursuant to Section 205. Because the contract contained an agreement to agree on new rates, and no explicit reservation of CIPS' right to make unilateral rate changes, the Commission was of the view that CIPS had bargained away its ability to establish rates unilaterally in exchange for petitioners' agreement to pay a reasonable price at the time of delivery. Because, under this view of the contract, the new rates would be established not by the utility but by the Commission, the Commission ruled that the change in the rates would be accomplished under Section 206(a) of the Power Act and therefore should take effect prospectively from the date of the Commission's order. Pet. App. 24a, 36a.

3. The court of appeals reversed the Commission on this aspect of its decision (Pet. App. 43a-70a).[1] The court observed that the problem here was "to determine the rights and obligations of the parties under the contracts when the specified rates for the first ten years terminate and the parties fail mutually to agree on rates for the subsequent years" (*id.* at 64a). To ascertain the parties' intent, the court looked to the contract language and construed it against the backdrop of the statutory scheme of the Federal Power Act. The court found that the language of the pertinent contractual provision supports CIPS' use of the Section 205 filing procedure to increase its rates (Pet. App. 66a). Noting that the Commission's authority to suspend and investigate rate filings under Section 205 has been interpreted as the authority to "approve" rates, the court stated that the contract language providing that rates shall be agreed upon by the

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[1]The parties challenged other aspects of the Commission's decision in the court of appeals. The court rejected these claims and they have not been presented for review in the petition for certiorari.

parties "subject to the approval" of the regulatory agency is consistent with Section 205 filings (Pet. App. 66a). Although the Commission in recent decisions had looked for explicit expressions in private contracts of the parties' intention to permit unilateral filings under Section 205, the court discounted this approach as "not highly relevant to the meaning of a provision executed in 1965" (Pet. App. 66a). Instead, the court noted that petitioners' acquiescence in previous unilateral rate increase filings by CIPS was far more probative as to the parties' intent and the fair meaning of the contracts (*id.* at 66a-67a).

ARGUMENT

Although the court of appeals reached a conclusion different from that reached by the Commission on the question of contract interpretation presented here, the decision of the court below does not conflict with the decisions of this Court or of any other court of appeals, nor does it warrant review for any other reason. The court's decision turns on the particular facts of this case and is therefore distinguishable from other cases cited by petitioners.

1. Petitioners contend (Pet. 8-11) that the decision of the court of appeals is inconsistent with the *Mobile-Sierra* doctrine. This contention is without merit.

As this Court explained in a similar case arising under the Natural Gas Act,[2] " '[t]he initial rate-making and rate-changing powers of * * * [utilities] remain undefined and unaffected by the Act.' [The utility], like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so." *United Gas Pipe Line Co.* v. *Memphis*

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[2]The relevant provisions of the Natural Gas Act and the Federal Power Act "are in all material respects substantially identical." *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. at 353. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

Light, Gas & Water Division, 358 U.S. at 113 (quoting from *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. at 343). Thus, as the court of appeals correctly noted (Pet. App. 63a; footnotes omitted), "[u]nder the * * * *Mobile-Sierra* doctrine, contracting parties may determine for themselves when and how existing rates may be altered, subject to FERC's power to adjust rates in the public interest. The principal inquiry in rate-setting contract disputes is to divine the intent of the parties to the contract as to how rates are to be set."

Consistent with the *Mobile-Sierra* doctrine, the court of appeals undertook to "decide whether the parties intended to permit CIPS to use the section 205 method of rate-setting, with its immediate effective date, or the section 206 method of rate-setting by FERC, which takes effect only after FERC issues its order setting a just and reasonable rate" (Pet. App. 66a). Nothing in the *Mobile-Sierra* decisions precluded the court from concluding, on the basis of the particular contract provision at issue, that the intent of the parties was to permit use of the Section 205 method.

Nor is the decision below inconsistent with the decisions of the District of Columbia Circuit[3] or of any other court of appeals. In each of the cases cited by petitioners (Pet. 11-15) the reviewing court, like the court of appeals in this case, construed the particular contract language at issue and considered any other evidence of record reflecting the parties' intent, in order to give effect to the bargain between the parties. For example, in *New York State Electric & Gas Corp.* v. *FERC*, 712 F.2d 762, 768 (2d Cir. 1983)(emphasis added), the contract provided that "Power Authority shall compensate NYSEG . . . at such rates as *shall be approved*

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[3]Of course, any intra-circuit conflict would be a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

by FERC." In light of this language, it was reasonable for the court to conclude that the parties had intended the effectiveness of rate changes to be dependent upon Commission action. In *Public Service Co. of New Mexico* v. *FERC,* 557 F.2d 227, 228 (10th Cir. 1977), and *Louisiana Power & Light Co.* v. *FERC,* 587 F.2d 671, 676 (5th Cir. 1979), the contracts at issue contained similar clauses that specified that the rates were subject to alteration or amendment "as shall be ordered," or "as a result of" orders, by the appropriate regulatory agency. Again, because the language of the contracts indicated an intent to make rate changes dependent upon agency action, the courts held that rate changes under those contracts could take effect only prospectively from the date of the agency's final order.

Similarly, in *City of Oglesby* v. *FERC,* 610 F.2d 897 (D.C. Cir. 1979), and *Papago Tribal Utility Authority* v. *FERC,* 610 F.2d 914 (D.C. Cir. 1979), the contract language clearly evidenced an intent to make rate changes dependent upon an order of the Commission, with the customer continuing to pay the old rate until the order issued. In *City of Oglesby,* the contract stated that the customer "agrees to pay * * * rate[s] * * * as now on file with or hereafter modified by order of" the regulatory agency (610 F.2d at 903). In *Papago,* the contract provided that "[t]he rates hereinabove set out . . . are to remain in effect . . . until changed by the Federal Power Commission" (610 F.2d at 920).[4]

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[4] *Kansas Cities* v. *FERC,* 723 F.2d 82 (D.C. Cir. 1983), also cited by petitioners (Pet. 14-15), is inapposite because the court there was not presented with a claim that the contracts permitted the utility to change its rates unilaterally under the Section 205 procedures. The Court's ruling in that case concerned the correct standard of proof to be applied when changing rates under Section 206 of the Act. See *Kansas Cities* v. *FERC,* 723 F.2d at 87.

The contract language in this case differs from the language at issue in the cases relied on by petitioners. Fairly read, the contracts provided for fixed rates for the first ten-year term; these rates clearly were not intended to apply to the second ten-year term of the contract.[5] With respect to the latter term, the agreements provided that the rates would be "mutually agreed to by both parties" subject to the approval of the appropriate regulatory agency. The problem here is that the contracts failed to provide for the circumstance in which the parties could not agree, and failed to specify when changes in the rates should take effect. Thus, it was left to the Commission and the court of appeals to decide how the parties intended their agreements to operate in the factual circumstances presented here.

Given the contractual language providing that rates shall be agreed upon by the parties "subject to the approval of the regulatory body," and petitioners' failure to protest CIPS' use of Section 205 rate setting procedures through almost seven years of the second ten-year term, it was not unreasonable for the court of appeals to determine that the contracts did not preclude the utility's use of the Section 205 procedures. Because this determination rests heavily upon the particular facts of this case, it does not warrant review by this Court.

2. Contrary to petitioners' second contention (Pet. 15-19), the court of appeals did not overstep the proper bounds of judicial review by making de novo findings of fact. Petitioners assert (Pet. 16) that the court of appeals "found that absence of objection by [petitioners] to an earlier rate filing is evidence of an intent" to permit Section 205 filings, but

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[5] "[T]he rates and charges for service hereinbefore set forth shall apply *only* during the first ten years of the period" (Pet. App. 20a, 61a (emphasis added)).

that the Commission "had expressly refused to make such a finding of fact."

Petitioners' acquiescence in prior CIPS unilateral rate filings is an undisputed historical fact. From this fact, the Commission concluded only that petitioners had waived their contractual defense to those earlier filings, not that petitioners had agreed to a modification of their contracts, as CIPS had maintained (Pet. App. 21a-22a). The court of appeals did not directly disagree with any of those conclusions, but instead was of the opinion that "the parties' conduct throughout the pertinent period of the contracts is probative of the parties' intent," and that petitioners' prior acquiescence was "highly instructive as to the fair meaning of the * * * contracts" (Pet. App. 66a-67a). Ultimately, therefore, the disagreement between the Commission and the court of appeals concerned interpretation of the contracts themselves. As the court of appeals itself has recently acknowledged, regardless whether the interpretation of a contract for the sale of electricity is regarded as raising an issue of fact or law, "the judgment of the expert agency that deals with agreements of this sort on a daily basis" should be accorded "great weight." *Kansas Cities* v. *FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983). We cannot say, however, that rejection by the reviewing court of the Commission's interpretation of such a contract would invariably exceed the proper bounds of judicial review. Viewed in that light, the question presented in this case — whether the court of appeals should have upheld the Commission's interpretation of the particular contracts here — is a fact-bound issue which, in light of the unusual contractual wording and surrounding circumstances involved, does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

1. Section 205 of the Federal Power Act, 16 U.S.C. 824d, provides in pertinent part:

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filled and published.

(e) Suspension of new rates; hearings; five month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings,

either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * *

2. Section 206(a) of the Federal Power Act, 16 U.S.C. 824(a) provides:

Unjust or preferential rates, etc.

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed,

charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected [*sic*] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.